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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

RAD REFERRAL: 03L-07
DATE REFERRED: November 14, 2003
DATE ACTIVATED: February 2, 2004

EXPIRATION OF STATUTE OF
LIMITATIONS:
March 20, 2006 – July 24, 2008

SOURCE:

RAD REFERRAL

RESPONDENTS:

Cynthia McKinney for Congress, and Elyria
Mackie, as Treasurer

RELEVANT STATUTES:

2 U.S.C. § 441a(a)
2 U.S.C. § 441a(f)
2 U.S.C. § 434(b)
11 C.F.R. § 102.9
11 C.F.R. § 104.3
11 C.F.R. § 104.11
11 C.F.R. § 110.1
11 C.F.R. § 110.2

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

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1 **I. INTRODUCTION**

2 This referral from the Reports Analysis Division ("RAD") involves apparent
3 excessive contributions accepted by Cynthia McKinney for Congress ("the Committee"),
4 the principal campaign committee supporting the re-election of Cynthia McKinney for
5 Congress during the 2002 election cycle. In addition, it appears that the Committee has
6 continuously failed to report unrefunded excessive contributions as debt in its disclosure
7 reports.

8 Cynthia McKinney served five terms in the House of Representatives representing
9 the 4th Congressional District of Georgia. On August 20, 2002, McKinney lost a close
10 Democratic primary race to challenger Denise Majette. More than half of the excessive
11 contributions identified in this referral consist of general election contributions that
12 became excessive after McKinney lost the primary election. The Committee
13 subsequently failed to refund its excessive general and primary election contributions
14 because the Committee spent all its funds on the primary election.¹

15 As described below, this Office concludes that the Committee violated 2 U.S.C.
16 § 441a(f) and 11 C.F.R. §§ 110.1 and 110.2 by knowingly accepting \$106,425 in
17 excessive contributions and failing to refund those contributions within sixty days.
18 Further, the Committee violated 2 U.S.C. § 434(b) and 11 C.F.R. §§ 104.3 and 104.11 by
19 failing to report as debt \$106,425 in unrefunded excessive contributions.²

¹ Cynthia McKinney for Congress, with Elyria Mackie as Treasurer, continued to serve as McKinney's authorized campaign committee in the 2004 election.

² The facts relevant to this matter occurred prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). Unless otherwise noted, all citations to the Act, codified at 2 U.S.C. §§ 431 *et seq*, the Commission's regulations and all statements of applicable law herein, refer to FECA and its implementing regulations as they existed prior to the effective date of BCRA.

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II. FACTUAL SUMMARY

Since shortly after the 2000 General Election through December 2002, the Committee reported the receipt of \$993,376.75 in total contributions, \$795,892.45 of which was designated for the 2002 Primary Election, \$64,875 was designated for the 2002 General Election, and \$132,609.30 was unitemized.³ Of these amounts, RAD initially identified at least \$10,600 in primary contributions and at least \$6,000 in general election contributions as having exceeded the applicable contribution limits. *See* 2 U.S.C. § 441a(a)(1)(A). After the candidate lost the primary election on August 20, 2002, it appears that all of the contributions received for the general election became excessive because the Committee failed to either redesignate, reattribute, or refund the contributions within 60 days, as required by 11 C.F.R. §§ 110.1(b)(3)(i) and 110.2(b)(3)(i). *See* RAD Referral dated Nov. 3, 2003 ("Referral"), at 3-4. Moreover, subsequent amendments to the Committee's disclosure reports increased the amount of excessive primary contributions and decreased the amount of excessive general election contributions.

As described below, the Committee's apparent attempts to remedy the excessive contributions in response to Requests for Additional Information (RAIs) sent by RAD after the 2002 General Election were untimely and, in some instances, increased the amount of excessive contributions received by the Committee.⁴

³ These designations are taken from the latest, amended versions of the Committee's disclosure reports for the 2002 elections.

⁴ Further, as illustrated below, the Committee's attempted remedies are, at times, difficult to understand because the Committee made a number of questionable late redesignations in its amended disclosure reports without providing a written explanation or supporting documentations, and follow-up inquiries by RAD were left completely unanswered in some cases.

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A. The 2002 October Quarterly Report

In its 2002 October Quarterly Report, the Committee disclosed \$10,600 in primary contributions and \$6,000 in general contributions that RAD identified as excessive on their face. On February 4, 2003, RAD sent an RFAI to the Committee asking, inter alia, that the report be amended to reflect any timely reattributions or redesignations. Because the candidate lost the primary, the RFAI also requested that the Committee refund all of its general election contributions, which totaled \$163,943.78 as reported at that time. *See Referral*, at 3; *see also* 11 C.F.R. § 102.9(e); AO 1992-15 at 2-3 (committee has 60 days after primary loss to refund or request redesignation of general election contributions). The Committee did not respond to the RFAI, and, on February 27, 2003, RAD sent a second notice.⁵

On March 19, 2003, the Committee filed an amended 2002 October Quarterly Report. The report amended the designations for 201 contributions made prior to the August 2002 primary, which were previously reported as general election contributions, to clarify that they were primary election contributions.⁶ *See Referral*, at 4. These contributions totaled \$101,668.78. Although the Committee did not provide a written explanation or supporting documentation, RAD accepted the amended report as correcting a previous reporting error that designated the contributions for the general

⁵ On February 15, 2003, the Committee filed an amendment to its 2002 12-Day Pre-Primary Report that changed the election year designation for all receipts, transfers and refunds from 2002 to 2004. The Committee did not provide any explanation or supporting documentation. *See Referral*, at 4. On June 17, 2003, RAD sent an RFAI regarding this amendment, but the Committee never replied. RAD believes that a software glitch may have caused the change from 2002 to 2004; thus, RAD disregarded the changes and included the contributions and refunds reported in the amended 12-Day Pre-Primary Report as being designated for 2002, not 2004.

⁶ The Committee did not amend the designation of all of its general election contributions

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1 election rather than the primary.⁷ The amended report, however, increased the amount
2 of excessive primary contributions from \$10,600 to \$42,200 and left a total of \$63,475 in
3 excessive general election contributions.⁸ *See id.*

4 On March 24, 2003, the Commission received a letter from the Committee stating
5 that the Committee had refunded 39 excessive primary and general election contributions
6 totaling \$31,180. The Committee enclosed copies of the front of the refund checks with
7 the letter. Even taking these refunds into account, the Committee's disclosure reports
8 continued to show excessive primary and general election contributions.

9 At this time, the Committee's treasurer also raised the argument that the
10 Committee should not have to refund general election contributions because of a then-
11 pending lawsuit filed on McKinney's behalf in which the plaintiffs asked the court to
12 invalidate the primary election results under the Voting Rights Act.⁹ *See Referral*, at 5
13 and Attachment 3. According to the Committee, until the legal challenge to the Primary

⁷ In a March 24, 2003, letter to the Commission, the Committee noted that the amended 2002 October Quarterly Report "corrected" the designations of 32 primary election contributions that had been previously reported as designated to the general election. The 32 contributions referenced by the Committee appear to have been part of the 201 contributions redesignated in the amended 2002 October Quarterly Report. It is not known why the Committee failed to provide an explanation for the redesignation of the remaining 169 contributions.

⁸ The Referral reports \$63,225 in excessive general contributions, but an accounting adjustment of \$250 increases the amount of general election excessive contributions to \$63,475.

⁹ On January 8, 2003, five former McKinney constituents filed a complaint against the state of Georgia, the Georgia Democratic Party and various state and local election officials alleging that the August 2002 primary race for Georgia's 4th District House seat violated the Voting Rights Act and the U.S. Constitution *See Referral*, Attachment 5. Specifically, the complaint alleges that the voting rights of African Americans in the 4th District were diminished because the primary was open, which allowed Republicans to vote for Denise Majette, McKinney's challenger. The plaintiffs state that McKinney won the majority of votes cast by Democrats in the predominantly Democratic district, but Majette won the election because of "cross-over" votes cast by Republicans. The plaintiffs asked the court to void the results of the primary and hold it again. On August 1, 2003, the district court dismissed plaintiffs' complaint on the grounds that it failed to state claims under the Constitution or Voting Rights Act for which relief could be granted. The plaintiffs appealed to the 11th Circuit and that court affirmed the district court's ruling. *See Osburn et al. v. Georgia*, 1:02CV2721 CAP (N.D. Ga. Aug. 1, 2003), *aff'd*, 369 F. 3d 1283 (11th Cir.), *cert. denied*, 73 U.S.L.W. 3246 (Oct. 18, 2004).

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1 Election was resolved, the election results cannot be considered a closed matter. *See*
2 Referral, Attachment 5. For this reason, the Committee explained that it would not make
3 general election refunds.

4 **B. 2003 April Quarterly Report**

5 On April 15, 2003, the Committee filed its 2003 April Quarterly Report, which
6 failed to disclose as disbursements the refunds referenced in the Committee's March 24,
7 2003 letter. Rather, the Committee reported the refunds as debt on Schedule D.¹⁰ On
8 April 17, 2003, RAD contacted the Committee who advised, through its treasurer, that the
9 reported refund checks had never been mailed because the Committee lacked funds to
10 make the refunds and because of the pending legal challenge to the primary election
11 results. The Committee's treasurer further advised that he did not know whether the
12 Committee had refunded any of the remaining excessive primary contributions, which
13 would not have been affected by the lawsuit. On April 22, 2003, RAD sent an RFAI
14 regarding the discrepancies between the Committee's March 24, 2003 letter, which
15 reported refunds had been sent, and the 2003 April Quarterly Report, which reported the
16 refunds as debt. The Committee did not respond to the RFAI or to a second notice sent
17 by RAD referencing the RFAI.¹¹

18 **C. 2003 October Quarterly Report**

19 In its 2003 October Quarterly Report, the Committee reported \$9,999 in refunded
20 contributions designated for the 2002 Primary Election, which were reportedly made to

¹⁰ This was the first time the Committee reported any debt since the primary election.

¹¹ In addition to the RFAIs noted above, RAD sent the Committee nearly 20 RFAIs, second notices, and informational notice letters regarding the above and other disclosure reports in 2003 regarding the 2001-2002 election cycle. RAD also made numerous telephone calls to the Committee's treasurer and attorney during this same time period. The Committee's responses were reportedly sporadic and incomplete.

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1 10 individuals in July 2003.¹² *See* Referral, at 7. Because the Committee made these
2 refunds more than 60 days after the refunded amounts became excessive, RAD did not
3 credit the Committee with the 2002 refunds in calculating the total amount of excessive
4 primary contributions contained in this Referral. *See id.*

5 **D. Miscellaneous Disclosure Dated June 8, 2004**

6 In June 2004, the Committee filed a miscellaneous disclosure containing copies of
7 refund checks for the 2002 election cycle. The filing contains copies of refund checks
8 payable to six individual contributors who had made a total of \$6,100 in excessive
9 primary contributions. The Committee also refunded a total of \$1,200 in general election
10 contributions to one individual contributor and another candidate's committee. The
11 Committee indicated that additional refunds would be made "as funds become available."
12 Certificates of mailing accompanied the photocopies of the checks contained in this
13 disclosure.

14 **E. Total Excessive Contributions**

15 After taking into account the Committee's amended designations, it appears that
16 the Committee has accepted \$106,425 in excessive contributions – \$42,950 designated
17 for the 2002 Primary Election and \$63,475 designated for the 2002 General Election.¹³

¹² In this report, the Committee also disclosed a \$1,000 refund of a contribution designated for the 2004 Primary Election.

¹³ The Referral reports \$43,200 in excessive primary contributions and \$63,225 in excessive general contributions, but an accounting adjustment of \$250 lowers the primary amount to \$42,950 and increases the general amount to \$63,475.

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III. LEGAL ANALYSIS

A. Excessive Primary Election Contributions

The Committee appears to have accepted \$42,950 in excessive contributions relating to the 2002 primary election. *See* Referral, at 3. Under the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), candidates and political committees are prohibited from knowingly accepting contributions in excess of the limitations in 2 U.S.C. § 441a(a)(1)(A), which during times relevant herein included \$1,000 per election from individuals and candidate committees and \$5,000 per election from multicandidate committees. *See* 2 U.S.C. § 441a(f). Here, the Committee knowingly accepted excessive contributions of \$24,950 from individual contributors, \$7,000 from multicandidate committees, and \$11,000 from other candidates' committees.

Initially, the Committee reported accepting \$10,600 in "facially" excessive primary contributions, that is, contributions that appeared on their face to exceed the contribution limitations set forth in 2 U.S.C. § 441a(a). The amount of excessive primary contributions increased, however, when the Committee amended the designation of 201 contributions totaling \$101,668.78 from the general election to the primary in its amended 2002 October Quarterly Report. *See* Referral, at 4. The Committee did not submit a written explanation or supporting documentation for the amended designations, but if one assumes the amendment is correct, it would appear that the Committee intended to correct reporting errors caused by the Committee's failure to attribute the contributions to the primary election in the first instance. If the committee originally incorrectly reported the designations on the contributions, or if it reported as general election contributions undesignated contributions received prior to the primary, the

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1 amendment was correct. Nevertheless, these amended designations increased the total
2 amount of excessive primary contributions to \$42,950.

3 Importantly, the Committee failed to maintain sufficient funds to refund these
4 excessive contributions in accordance with 11 C.F.R. §§ 110.1 and 110.2. Further, the
5 Committee could not redesignate or reattribute these contributions for another election
6 because McKinney was not a candidate in the general election.

7 **B. Excessive General Election Contributions**

8 In the Committee's 2002 October Quarterly Report, RAD identified \$6,000 in
9 facially excessive general election contributions. None of these contributions were
10 redesignated, reattributed or refunded within the 60-day time frame set forth in 11 C.F.R.
11 §§ 110.1 and 110.2. After McKinney lost the primary election, the Committee increased
12 its excessive general election contributions to \$63,475 (\$42,975 of which came from
13 individual contributors and \$20,500 from multicandidate committees) by failing to
14 refund, redesignate or reattribute all of the contributions designated for the general
15 election within 60 days after the candidate's primary loss, or within 60 days after the
16 receipt of general election contributions received after the primary election. *See* Referral,
17 at 3.

18 Indeed, the Committee could not take full advantage of the Commission's
19 redesignation rules because: (1) many general election contributors had "maxed out"
20 their primary contribution limits; (2) the Committee's disclosure reports showed that the
21 Committee did not have any net debt outstanding; and (3) there were no more elections
22 scheduled in the 2002 election cycle in which the candidate could have participated. *See*
23 11 C.F.R. § 110.1(b)(5)(i). Moreover, according to disclosure reports, the Committee

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1 spent all, or nearly all, of its money on the primary election and, therefore, did not have
2 sufficient funds to make the necessary refunds.¹⁴ Thus, the Committee apparently failed
3 to use an acceptable accounting method to distinguish between primary and general
4 election contributions as it was required to do by 11 C.F.R. § 102.9(e).

5 In response to inquiries made by RAD, the Committee asserted that the then-
6 pending Voting Rights Act lawsuit challenging the results of the primary election, in
7 effect, stayed the Committee's obligation to refund excessive contributions until the legal
8 challenge was concluded. It is unclear whether the Committee relied upon this argument
9 to justify the failure to refund the excessive portions of general election contributions
10 only, or both primary and general election contributions. At times, the Committee
11 reportedly applied this argument to general election refunds only, and at other times, it
12 failed to specify which election refunds it means. In any event, the Committee cited no
13 legal authority in support of its argument and apparently chose not to seek an Advisory
14 Opinion, as suggested by RAD,¹⁵ or a stay from the 11th Circuit.¹⁶ See Referral, at 5. For
15 these reasons, this Office does not believe that the unsuccessful lawsuit brought by
16 Georgia voters, and to which the Committee was not a party, has any bearing on
17 enforcement of the matters contained in this referral. Furthermore, on May 17, 2004, the

¹⁴ The Committee reported \$91,464.05 in cash on hand in its amended 2002 October Quarterly Report, \$42,558 in cash on hand in its amended 2002 Year End Report, and \$991.83 in its amended 2003 April Quarterly Report

¹⁵ About one month after the Committee's treasurer advised RAD that he would think about requesting an Advisory Opinion, he advised RAD that he had written such a request but had given it to someone else to mail, which the unidentified person never did. See Referral, Attachment 4. He then stated that he would personally mail the letter, *see id.*, but it appears that the Commission never received an Advisory Opinion request from the Committee.

¹⁶ Unlike the U.S. Bankruptcy Code, the Voting Rights Act does not provide for an automatic stay. See also AO 1991-27 (observing that a pending appeal regarding the constitutionality of a California constitutional provision, in the absence of the appellate court issuing a stay or injunction, did not bar enforcement of the provision).

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1 11th Circuit affirmed the district court's dismissal of the plaintiffs' claims, and on
2 October 18, 2004, the Supreme Court denied plaintiffs' petition for certiorari.

3 **C. Reporting Violation**

4 As discussed above, it appears that the Committee carried debt in the form of
5 unrefunded excessive contributions before the 2002 Primary Election. Under the Act and
6 Commission regulations, a political committee has the obligation to continuously report
7 all of its outstanding debt until repaid or extinguished. *See* 2 U.S.C. § 434(b)(8); 11
8 C.F.R. §§ 104.3(d) and 104.11. A Committee only has this obligation when it is unable
9 to refund contributions. If the Committee had been in a position to refund the money, its
10 obligation would have been to refund the contributions. However, once the Committee
11 depleted its resources, it had an obligation to report the unrefunded amounts. In this
12 instance, the Committee failed to report unrefunded excessive contributions as debt since
13 at least its 2002 October Quarterly Report. Although the Committee reported \$31,080 in
14 unrefunded contributions in its 2003 April Quarterly Report, this disclosure was
15 untimely, and the Committee failed to report the remaining \$75,345 (\$106,425- \$31,080)
16 entirely.

17 **D. Recommendations**

18 In short, the Committee apparently accepted more than \$42,000 in excessive
19 primary election contributions without obtaining timely reattributions and completely
20 failed to refund any of the more than \$64,000 it received in general election
21 contributions. Moreover, it failed to use an acceptable accounting method to distinguish
22 between the primary and general election contributions, and as a result, spent all of the

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1 general election contributions on the primary. Finally it failed to report its refund
2 obligations as debt.

3 Based upon the foregoing, this Office recommends that the Commission find
4 reason to believe that Cynthia McKinney for Congress and Elyria Mackie, as treasurer,
5 violated 2 U.S.C. § 441a(f) and 11 C.F.R. §§ 110.1 and 110.2 by knowingly accepting
6 \$106,425 in excessive contributions. In addition, this Office recommends that the
7 Commission find reason to believe that Cynthia McKinney for Congress and Elyria
8 Mackie, as treasurer, violated 2 U.S.C. § 434(b) and 11 C.F.R. §§ 104.3 and 104.11 by
9 failing to timely and accurately report as debt these unrefunded excessive contributions.

10 **IV. DISCUSSION OF CONCILIATION AND CIVIL PENALTY**

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V. RECOMMENDATIONS


1. Open a MUR in RAD Referral 03L-07;
2. Find reason to believe that Cynthia McKinney for Congress and Elyria Mackie, as treasurer, violated 2 U.S.C. § 441a(f) and 11 C.F.R. §§ 110.1 and 110.2;
3. Find reason to believe that Cynthia McKinney for Congress and Elyria Mackie, as treasurer, violated 2 U.S.C. § 434(b) and 11 C.F.R. §§ 104.3 and 104.11;
4. Enter into pre-probable cause conciliation with McKinney for Congress and Elyria Mackie, as treasurer, prior to a finding of probable cause to believe;
5. Approve the attached proposed Conciliation Agreement;
6. Approve the attached Factual and Legal Analysis; and
7. Approve the appropriate letters.

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Lawrence H. Norton
General Counsel

Lawrence Calvert
Deputy Associate General Counsel

11/17/04
Date

BY: 
Ann Marie Terzaken
Assistant General Counsel


Elena Paoli
Attorney

Other Staff Assigned:
Lela Scott

Attachments

1. Proposed Conciliation Agreement
2. Proposed Factual and Legal Analysis

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